ABDUL GHANI MOHD. MUSTAPHA

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
T. KULASEKARAM J
LAI KEW CHAI J
[CRIMINAL MOTION NO. 26 OF 1982]
7 MAY 1984

CRIMINAL LAW AND PROCEDURE: *Charge of corruptly accepting gratification - Accused acquitted - Defence not called - Appeal - Degree of proof required at the close of prosecution - Whether orbiter dicta or ratio decidendi - Whether Privy Council is precluded from interpreting decision of the Court of Appeal.*

The appellant was charged for corruptly accepting for himself a gratification of $500 and $2000 as inducement to be lenient in his supervision of the construction of the Sewerage Treatment Plant and the Hydrocracker Control Room projects, both of which were constructed by Tong Brothers Construction (Pte.) Ltd. At the conclusion of the trial by the Subordinate Court, the appellant was acquitted on both the charges.

Following the acquittal the Public Prosecutor appealed to the High Court and contended *inter alia*, that the learned District Judge had erred in law in not calling upon the appellant for his defence. Chua J accepted the submission and held that the District Judge was bound by what the Privy Council had laid down in *Haw Tua Tau v. Public Prosecutor* and that he should have called the defence of the appellant on the two charges. Chua J allowed the appeal of the Public Prosecutor and reserved the following two questions for the decision of the Court of Appeal.

(a) Whether the degree of proof required at the close of the prosecution case by Lord Diplock (in *Haw Tua Tau's* case) is *orbiter dicta* or *ratio decidendi*.

(b) Whether the judicial construction given to s. 172(f) (sic) of the Criminal Procedure Code in *Ong Kiang Kek v. PP* by the Court of Criminal Appeal by virtue of the legislature having repeated them without alternation in the subsequent statute, i.e. Act 10, is deemed to have been approved by the legislature thereby precluding the Privy Council from giving a different interpretation.

Held:

[1] Question (a) - The interpretation of s. 188(1) of the Criminal Procedure Code was necessary for the decision of the Privy Council case, *Haw Tua Tau v. PP*, which is not *orbiter dicta*.

[2] Question (b) - The Judicial Committee of the Privy Council is not precluded from giving an interpretation which is different from the interpretation given by the Court of Appeal in *Ong Kiang Kek v. PP*.

Cases referred to:

Haw Tua Tau v. PP [1981] 1 MLJ 49; [1981] CLJ (Rep) 11
Ong Kiang Kek v. PP [1970] 2 MLJ 283
Regina v. Bow Road Justices (*Domestic Proceedings Court*) *Ex parte Adedigba [1968] 2 QB 572*

Legislation referred to:
Criminal Procedure Code [Sing], ss. 181, 188(1), (2), 189(1), (2), (3), 190, 195(1), (2), (3), 177C, 179(f)
Constitution of Singapore, arts. 9(1), 4

JUDGMENT

Wee Chong Jin CJ, T. Kulasekaram J, Lai Kew Chai J:

At Court No. 12 of the Subordinate Courts of Singapore on 3, 4 & 19 August 1981 one Abdul Ghani Mohd. Mustapha was charged, *inter alia* as follows:

> You, Abdul Ghani Mohd. Mustapha, are charged that you, on or about 25 November 1977, in Pulau Bukom, Singapore, being an agent, namely, a Civil Supervisor in the employ of Shell Eastern Petroleum (Pte) Ltd., Pulau Bukom, Singapore, did corruptly accept from one Tong Fatt Chong, the Managing Director of Tong Brothers Construction (Pte) Ltd. for yourself, a gratification of a sum of Five Hundred Dollars ($500) as an inducement for showing favour in relation to your principal's affairs, by being lenient in your supervision of the works done by Tong Brothers Construction (Pte) Ltd. in respect of the Sewerage Treatment Plant's Project, and you have thereby committed an offence punishable under s. 6 (a) of the Prevention of Corruption Act, Chapter 104.

> You Abdul Ghani Mohd. Mustapha, are charged that you, on or about 5 September 1979 in Pulau Bukom, Singapore, being an agent, namely, a Civil Supervisor in the employ of Shell Eastern Petroleum (Pte) Ltd. Pulau Bukom, Singapore, did corruptly accept from one Tong Fatt Chong, the Managing Director of Tong Brothers Construction (Pte) Ltd. for yourself, a gratification of a sum of two thousand dollars ($2,000) as an inducement for showing favour in relation to your principal's affairs, by being lenient in your supervision of the works done by Tong Brothers Construction (Pte) Ltd. in respect of the Hydrocracker Control Room Project, and you have hereby committed an offence punishable under s. 6(a) of the Prevention of Corruption Act (Chapter 104).

At the conclusion of the trial on 19 August 1981 the said Abdul Ghani Mohd. Mustapha was acquitted on all charges.

Following the acquittal the Public Prosecutor appealed to the High Court and at the hearing of the Appeal (Magistrates Appeal No. 161/81) before Chua J the Public Prosecutor contended *inter alia* that the District Judge was wrong in that:

(a) the learned District Judge erred in law and in fact in failing to consider or adequately consider that the evidence adduced by the prosecution at the close of its case had established each essential element in the charge; that applying the test laid down by Lord Diplock in *Haw Tua Tau's* case ([1981] CLJ (Rep) 11), a *prima facie* case had been established and therefore the respondent's defence ought to have been called.

(b) that the learned District Judge erred in law:

(i) in not calling upon the respondent for his defence when he had not found any of the essential elements of the charge lacking in the prosecution's case;

(ii) in disregarding and ignoring the principle laid down in *Haw Tua Tau's* case that, a Judge as a decider of facts must keep an open mind as to the accuracy of any of the prosecution witnesses until the Defence has tendered such evidence.

(c) that the learned District Judge erred in law in holding that *Ong Kiang Kek's* case ([1970] 2 MLJ 283) continues to be binding on him when that case has been overruled by *Haw Tua Tau's* case, which was a decision of the Privy Council, and in so doing, he has ignored the doctrine of *stare decisis*.

Chua J accepted the submissions of Counsel for the appellant and held the view that the Privy Council interpretation of s. 188(1) of the Criminal Procedure Code in *Haw Tua Tau v. PP* is not *orbiter dicta* and that the decision of the Court of Criminal Appeal in *Ong Kiang Kek v. PP* has been overruled. Chua J decided that the District Judge was bound by what the Privy Council has laid down in *Haw Tua Tau's* case and that he should have called the defence of the respondent on the two charges.

Chua J accordingly allowed the appeal and reserved the following two questions for the decision of this Court:

(a) Whether the degree of proof required at the close of the prosecution case by Lord Diplock (in *Haw Tua Tau's* case) is *orbiter dicta* or *ratio decidendi*.

(b) Whether the judicial construction given to s. 172(f) (sic) of the Criminal Procedure Code in *Ong Kiang Kek v. PP* by the Court of Criminal Appeal by virtue of the legislature having repeated them without alteration in the subsequent statute, i.e. Act 10, is deemed to have been approved by the legislature thereby precluding the Privy Council from giving a different interpretation.

Question (*a*)

The Judicial Committee of the Privy Council dealt with three appeals in their judgment. The three appeals were *Haw Tua Tau v. PP, Tan Ah Tee v. PP* and *Low Heng Seng v. PP*. In these appeals the Board gave special leave to appeal to enable the appellants to raise the question of the inconsistency of the Criminal Procedure (Amendment) Act 1976 (Act No. 10 of 1976) with Article 9(1) of the Constitution of Singapore which provides that "No person shall be deprived of his life or personal liberty save in accordance with law".

The only question argued before the Board was the contention, common to all three appellants, that the amendments made to the Criminal Procedure Code by Act No.10 of 1976 were inconsistent with Article 9(1) of the Constitution and, being inconsistent, were rendered void by Article 4. The whole foundation of the argument on which that contention was based was the interpretation that the Board had placed on the expression "law" in the context of Article 9(1) in the case of *Ong Ah Chuan v. PP* ([1981] 1 MLJ 64). The Board rejected that contention and gave their reasons in a judgment delivered by Lord Diplock.

The passage in the Board's judgment relied upon by the three appellants reads:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to `law' in such contexts as `in accordance with law', `equally before the law', protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties and the purported entrenchment (by art. 5) of art. 9(1) and 12(1) would be little better than a mockery.

Lord Diplock in the Board's judgment in the case of *Haw Tua Tau* after quoting the above passage said:

> The subsequent paragraphs of the judgment made clear their Lordships' view that neither Article 9(1) nor 12(1) called for the perpetuation of the rules of criminal procedure or of evidence as they existed in Singapore when the Constitution came into force on 16 September 1963. So no amendment to the Constitution is needed to empower the legislature of Singapore (the President and Parliament) to enact whatever laws it thinks appropriate to regulate the procedure to be followed at the trial of criminal offences by Courts in Singapore; subject only to the limitation that so long as Article 9(1) remains unamended such procedure does not offend against some fundamental rule of natural justice. It must not be obviously unfair. So the question for their Lordships is not whether Act No. 10 of 1976 made a significant alternation to the disadvantage of accused persons in the procedure previously followed in criminal trials in Singapore (as indisputably it does), but whether the consequence of the alteration is a procedure for the trial of criminal offences that is contrary to some fundamental rule of natural justice.
>
> ...The only rule alleged to be the fundamental rule of natural justice, against which the appellants claim Act No.10 of 1976 offends, is the so-called privilege against self incrimination as expressed in the Latin maxim *nemo debet se ipsum prodere*.

It was submitted by the appellants that s. 188(2) read with s. 188(1) had the practical effect of compelling the appellants when called upon to enter their defence, to give evidence on oath or affirmation and thus be subject to hostile cross-examination by the prosecution so that the procedure prescribed by s. 188(2) infringes a fundamental rule of natural justice. Section 188(1) and (2) reads:

> 188(1) When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence.
>
> (2) Before any evidence is called for the defence, the Court shall tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect will be if, when so called upon, he refuses to be sworn or affirmed, and thereupon the Court shall call upon the accused to give evidence.

The submission was based on the argument that trial Judges relying on the case of *Ong Kiang Kek v. PP* (*supra*), have generally interpreted s. 188(1) to mean that the trial Court, at the close of the case of the prosecution, has to determine whether or not the prosecution's evidence, if unrebutted, has established the case against the accused beyond a reasonable doubt and if, at that stage, it has not been so established, the trial Court must acquit the accused.

Lord Diplock, to meet this argument, considered ss. 188(1) and (2) and 189(1) to (3), 190 and 195(1) to (3) of the Criminal Procedure Code, of which 188(2) and 195 (1) to (3) were inserted by Act No. 10 of 1976. First, he dealt with the interpretation of s. 188(1) at length:

> ... because in the judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kek v. PP* there are certain passages that seem, upon a literal reading, to suggest that unless at the end of the prosecution's case the evidence adduced has already satisfied the Judge beyond a reasonable doubt that the accused is guilty, the Judge must order his acquittal. But this can hardly have been what that Court intended for it ignores the presence in the section of the crucial words "if unrebutted', to which in other passages the Court refers, and it converts the hypothetical question of law which the Judge has to ask himself at that stage of the proceeding: 'if I were to accept the prosecution's evidence as accurate would it establish the case against the accused beyond a reasonable doubt?' into an actual and quite different question of fact: 'Has the prosecution's evidence already done so?' For the reasons already discussed their Lordships consider this to be an incorrect statement of the effect of s. 188(1).

The reasons which the Board gave for its opinion that if one gives a literal reading to certain passages in the Judgment in the *Ong Kiang Kek* case then those passages certainly are incorrect statement of the effect of s. 188(1) are set out in the following passages in Lord Diplock's judgment (at pp. 51-52):

> Section 188(1) states the conditions precedent to the right and duty of the Judge of trial to call on the accused to enter on his defence. It takes the form of a double negative: if the Court does not find that no case against the accused has been made out which, if unrebutted, would warrant his conviction. For reasons that are inherent in the adversarial character of criminal trial under the common law system, it does not place upon the Court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the Court to do so.
>
> The crucial words in s. 188(1) are the words "if unrebutted', which make the question that the Court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by s. 188(1) the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true: and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is impossible to assess to what extent (in any) that witness's evidence has been confirmed explained or contradicted by the evidence of other witnesses.
>
> The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a Judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided: questions of law are for the Judge, questions of fact are for the jury. It was well established that in a jury trial at the conclusion of the prosecution's case it is the Judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the judge must let case go on. It is not the function of the jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had an opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the Court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

> In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single Judge (or in two Judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of s. 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosection's witnesses until the defence has tendered such evidence if any, by the accused or other witnesses as it may want to call and Counsel on both sides have addressed to the Judge such arguments and comments on the evidence as they may wish to advance.

Lord Diplock then considered the argument of the three appellants based on the contention that the procedure for which s. 188(2) provides, of calling on the accused at the conclusion of the prosecution's case to give evidence and informing him of the consequences of a refusal to do so, has the practical effect of putting the accused under a compulsion to give evidence no less than if he were compelled by law to do so, despite his being told in the course of the standard allocution that he is not. The argument was that fundamental rules of natural justice are concerned with the practical effect upon the defendant of the procedure followed, not with its legal technicalities; and if the maxim *nemo debet se ipsum prodere* enshrines a fundamental rule of natural justice, the procedure prescribed by s. 188(2) infringes it. The board found no substance in the appellants' argument in the following passage (at p. 53):

> There is, however, in their Lordships' view, no substance in the appellants' argument. The accused is not compelled in law to give evidence on his own behalf. Section 195(3) say so, and s. 188(2) requires that the accused be told so. Even before s. 195(1) withdrew the former option to make an unsworn statement, instead of going into the witness box to give evidence, the accused, if he were properly advised by Counsel, would be aware that adverse inferences might well be drawn if he failed to go into the witness box; the strength of those inferences depending upon the nature of the evidence that had been adduced against him in the particular case.
>
> This in itself would be a strong inducement to an accused to give evidence, particularly if he were innocent. The only added inducement consequent on the removal of the option is the withdrawal of the hope that he can get away with a story the truth of which cannot be tested by cross-examination. The inferences that the Court may draw from his failure to testify are not enlarged by the amendments to the Code; they are limited, as they have always been, to such inferences as appear to the decider of fact to be proper in the particular case having regard to all its circumstances.

From the passages (which we have set out) in the judgment delivered by Lord Diplock we are of the opinion that the interpretation of s. 188(1) of the Criminal Procedure Code was necessary for the decision of the case of *Haw Tua Tau v. PP.*

Question (*b*)

In the case of *Ong Kiang Kek v. PP* ([1970] 2 MLJ 283) the question before the Court of Appeal involved the interpretation of s. 177C of the Criminal Procedure Code which is materially similar to s. 172(f), now re-numbered s. 179(f). Section 177C was re-numbered s. 181 in the Criminal Procedure Code, Chapter 113 at Vol. III of the 1970 Revised Edn. of the *Statutes of the Republic of Singapore* which came into force on 15 April 1971. By Act 10 of 1976, it was again re-numbered as s. 188(1) and it is so appears in the present Reprint of the Criminal Procedure Code which was published on 31 July 1980.

We answered Question (b) in the negative because, in our opinion, the re-enactment of s. 177C did not preclude the Judicial Committee of the Privy Council from giving an interpretation which is different from the interpretation given by the Court of Appeal in *Ong Kiang Kek's* case (see *Regina v. Bow Road Justices (Domestic Proceedings Court), Ex parte Adedigba* [1968] 2 QB 572).

Also found at [1984] 2 CLJ 309